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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1050

PETER J. GIANARIS, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner Peter J. Gianaris respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on November 21, 1978.

DECISION BELOW

The judgment of the Court of Appeals, entered November 21, 1978, without opinion, appears in the appendix hereto.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The Court of Appeals for the District of Columbia Circuit has held that court-authorized wire interceptions of petitioner, upon which his gambling convictions are based, were undertaken in full conformance with 18 U.S.C. 2510 *et seq.* The question presented is:

Where an FBI application for wire interception fails to set forth fully and completely the circumstances of past physical searches and a pen-register investigation involving petitioner in 1971 and 1972 and conceals significant successful elements of those prior investigations by ordinary investigative techniques, does the application comply with the requirements of 18 U.S.C. 2518(1)(c)?

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2518(1)(c) provides:

> (1) Each application for an order authorizing or approving the interception of a wire or oral communciation shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information . . .
>
> > (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

STATEMENT OF THE CASE

Introduction

By indictment filed December 21, 1976, petitioner Peter J. Gianaris was charged with violation of the

federal gambling statutes.[1] The essence of the crimes charged was petitioner's unlawful acceptance of wagers on sporting events—principally bets for or against the Washington Redskins or other professional football clubs—from a period beginning on September 1, 1974, through March 11, 1976. The Government's evidence that petitioner had accepted wagers of this sort was chiefly the product of wire interceptions. Petitioner argued unsuccessfully that the wire interceptions were conducted in violation of 18 U.S.C. 2510 *et seq.*, and the Fourth Amendment; he thereafter agreed to a trial by the court upon a stipulated record. On October 14, 1977, such a trial was held before United States District Judge Charles R. Richey. Judge Richey found petitioner guilty of violation of 18 U.S.C. 1955, as charged in count two of the indictment. On December 28, 1977, petitioner was sentenced to a term of six months' incarceration to be followed by a five-year term of probation. He was also fined $10,000 and was required to donate two-hundred hours of his time to certain community service projects. Petitioner's conviction was affirmed by *per curiam* judgment of the United States Court of Appeals on November 21, 1978.

Petitioner renews in this forum his contention that the wire interceptions beginning December 31, 1975, were unlawful. As background for this position, we set forth hereafter a statement of the case that treats the following matters: the history of the investigation of petitioner prior to the installation of the December 31,

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[1] The indictment, subdivided into six counts, charged violations of 18 U.S.C. 1952 and 1955, along with an allegation of conspiracy as proscribed by 18 U.S.C. 371. Included in the indictment were seven co-defendants, most of whom disposed of their cases either by plea of guilty or nonjury trial upon a stipulated record. One co-defendant obtained complete dismissal of the charges.

1975, challenged interceptions; the contents of the documents relating to the challenged interceptions; the suppression proceedings before Judge Richey; and the trial proceedings that resulted in petitioner's conviction. It is our thesis that the sum of these circumstances demonstrates basic violations of petitioner's constitutional and statutory rights and requires reversal of his conviction.

A. The Pre-1975 Investigation of Petitioner by Conventional Law Enforcement Techniques

1. *The July 16, 1971, Search of 1522 K Street, N.W.* Petitioner was the subject of a search at 1522 K Street, N.W., on July 16, 1971, pursuant to United States Warrant No. 4871-71. According to law enforcement officials who executed the warrant, a wide range of allegedly incriminating items were seized, including various betting slips and related gambling paraphernalia.

2. *The December 14, 1971, Pen Registers.* On December 14, 1971, the Federal Bureau of Investigation (FBI) obtained approval from the United States Magistrate in Alexandria, Virginia, to install a pen register on a telephone located at 6200 Wilson Boulevard, Falls Church, Virginia. On that same day, the FBI also obtained authorization to install a pen register on the telephone at 750 S. Dickerson Street, Arlington, Virginia. Targets of both pen registers were members of the Freeman family, the same persons specified as potential associates of petitioner throughout the wiretap application of December 31, 1975. (*See, e.g.,* December 31, 1975, Application at 27-28.) Both of the December 14, 1971, pen registers were issued on the basis of an affidavit in which the FBI asserted the value of pen-register technique in sports betting and gambling investigations.

The S. Dickerson Street pen register revealed no information; however, the Wilson Boulevard installation revealed a wide range of information, including patterns of incriminating calls on key betting days as well as telephone communications to telephones listed to petitioner. The information developed by the pen register at Wilson Boulevard in December 1971 was considered by the FBI to be highly significant and reliable and was relied upon by the FBI in March 1972 to obtain a search warrant of petitioner's very premises, at 3201 Wisconsin Avenue, N.W., Apartment 305. (March 8, 1972, Affidavit at 5-6.) [2]

3. *The March 10, 1972, Search of 3201 Wisconsin Avenue, N.W.* Agents Strentz and Manley of the FBI executed the March 8, 1972, search warrant for Apartment 305 at 3201 Wisconsin Avenue, N.W., on March 10, 1972. The agents encountered a substantial array of gambling paraphernalia, which they duly noted on the search warrant return.

---

[2] The FBI in its search warrant application described the contents and benefits of the Wilson Boulevard pen register thusly:

> During December 1971, the Alexandria Field Office of the FBI obtained a court order to utilize a device to register outgoing telephone calls from telephone with number 534-4203 at 6200 Wilson Boulevard, Apartment 908, Falls Church, Virginia. This location had been identified by investigation of [Special Agents] of the Alexandria Office of the FBI as one of the gambling offices of the Daniel Murray Freeman operation. The device to register telephone calls reflected upwards of sixty incoming and outgoing calls at this number each day it was operating. December 16, 1971, was a Thursday, and in the experience of agents who investigate gambling matters, it is known that this is generally the last day the updated odds for the weekend sports contests are available. December 16, 1971, and December 19, 1971, several outgoing calls to number 244-4620 were registered. The 1970 WDC city directory on page ten shows the telephone number 244-4620 is listed to Peter John Gianaris. (March 8, 1972, Affidavit at 5-6.)

B. The Interception Application of December 31, 1975

On December 31, 1975, Agent Thomas Marsh of the FBI, a member of the Bureau since 1969 and an experienced gambling investigator, submitted an application for wire interception of telephones located at 1329 14th Street, N.W., to United States District Judge Howard F. Corcoran. At the heart of the December 31, 1975, application is the claim that pen-register investigation of the suspected telephones as well as search-warrant execution would both be useless. (December 31, 1975, Application at 4-6.) Establishment of this two-pronged assertion to the satisfaction of the issuing judge would allow the FBI to move directly to the more intrusive technique of wire interception and to forego the less intrusive and more traditional evidence-gathering techniques. In asserting to Judge Corcoran that pen-register usage and search-warrant execution would prove fruitless, the FBI in its December 31, 1975, application made several critical misrepresentations or omissions of highly material fact.

1. *The July 16, 1971, Search of 1522 K Street, N.W.* The December 31, 1975, application omits all reference to the 1971 search of 1522 K Street, N.W., and the substantial evidentiary seizures that were made as a result.

2. *The December 14, 1971, Pen Registers.* The December 31, 1975, application omits all reference to the December 14, 1971, pen register at Wilson Boulevard and to its substantial results and their impact on the Gianaris investigation that followed. There is *not a single reference* to the 1971 pen register throughout the 48-page application.

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[3] December 31, 1975, Application at 1.

3. *The March 10, 1972, Wisconsin Avenue Search.* The December 31, 1975, application mentions the 1972 Wisconsin Avenue search. In a brief paragraph at the bottom of page 5 and the top of page 6, the application describes the search as resulting in a negligible seizure that failed to identify other persons involved in the gambling operation or allow prosecution of petitioner for more than a violation of the District of Columbia Code. The application, however, does not set forth the contents of the seizure, which are decidedly more substantial than the reader is led to believe, nor does the application advise the reader that a principal basis for the search was the successful 1971 pen register at Wilson Boulevard.

Unaware of the full and complete state of the prior investigation of petitioner by search-warrant and pen-register techniques, Judge Corcoran issued the interception authorization as requested by the FBI; he found that normal investigative techniques would be unavailing to achieve the FBI's stated objectives. The wiretap began shortly after its December 31, 1975, authorization and ran for a period of twenty days. The interceptions were terminated on January 18, 1976, and various search warrants were executed on that same day. Contrary to the FBI's assertions in the December 31, 1975, application that such seizures would be negligible, in fact the January 18, 1976, seizures were substantial. The premises at 1329 14th Street, N.W., yielded major seizures, without any destruction of records. (Tr. 134-135.) Other premises, including petitioner's own home, were similarly searched with success.

C. The Suppression Proceedings

Following indictment, petitioner through counsel moved to suppress the wire interceptions at 1329 14th Street, N.W., and the evidence to which those interceptions led. Petitioner advanced the claim that the interception application of December 31, 1975, violated the requirements of 18 U.S.C. 2518(1)(c) and failed to include the requisite "full and complete" statement about prior investigative procedures and their degree of success or failure. Petitioner contended that had Judge Corcoran been properly advised about earlier searches and pen-register investigations, he would not have concluded that normal investigative procedures had been tried and had failed or appeared too dangerous or unlikely to succeed.

On April 14 and 18, 1977, a suppression hearing was held before Judge Richey. The Government's principal witness was the author of the December 31, 1975, application, FBI Agent Thomas Marsh. Agent Marsh testified that he had been assigned to the Washington Field Office since 1971 and had been assigned to gambling investigations since March 20, 1972. (Tr. 98-100.) While not a participant in the 1971 and 1972 investigations of the Gianarises and their colleagues, Agent Marsh testified that he was familiar with the general circumstances of these matters. Thus, he testified that he was aware that the Metropolitan Police Department had executed a search warrant at 1522 K Street, N.W., in July 1971. That information was contained in FBI files that he reviewed. (Tr. 139-141.) He was also aware of the search of Peter Gianaris' premises at 3201 Wisconsin Avenue, N.W., on March 10, 1972, as this information was also contained in FBI files that he reviewed. (Tr.

141.) And Agent Marsh testified that at the time of his application to Judge Corcoran he was also aware of the pen-register investigation involving petitioner and other persons in Virginia in December 1971. (Tr. 142.)

As regards the 1971 pen-register investigation, Agent Marsh was aware that approximately 60 incoming and outgoing calls had been seized. He was aware that some of the outgoing calls had been connected to petitioner. He knew that the pattern of the calls suggested to experienced agents that a sports betting operation was occurring. (Tr. 143-146.)

Agent Marsh admitted that in applying for the 1975 interception *he told neither the prosecutor nor the Court* about the 1971 pen register and its results nor the 1971 search. (Tr. 155.) Moreover, he conceded that he omitted the 1971 pen register from the wiretap application in giving his description of the basis for the 1972 search. That search was based upon four investigative sources: informant information; visual surveillances; record and file reviews; and the 1971 pen register. Agent Marsh testified that he *intentionally omitted* the 1971 pen register as a basis for the search warrant in describing its foundations. (Tr. 150-151.)

Agent Marsh then prepared a wiretap application for submission to Judge Corcoran in which he averred that search-warrant execution would prove a useless investigative technique and that pen-register intrusions would also be useless. He asserted that there existed a high probability of destruction of evidence were a physical search to be conducted. Agent Marsh, however, neglected to tell Judge Corcoran the details of the 1971

search and pen register nor the details of the 1972 search. (Tr. 133, 155-165.)

Following argument, the trial court denied petitioner's motion to suppress. It rendered its opinion orally from the bench:

> Now, the only thing that remains is the application before Judge Corcoran under Title III, particularly Section 2518(1)(c).
>
> The Court has considered this most carefully over the weekend and finds, as I told you the other day, that the Government did have probable cause to believe that the defendants were engaged in federal gambling offenses. Therefore, that defense is overruled.
>
> The problem that remains is the prior pen-register and the sufficiency of the affidavit with respect to other investigative techniques.
>
> The Court finds that there was no violation of this statute, and, therefore, the motion to suppress will be denied. (Tr. 273.)

REASONS FOR GRANTING THE WRIT

This case presents important federal questions concerning the application of the provisions of 18 U.S.C. 2510 *et seq.* It presents the question of the proper degree of candor and completeness required of an application submitted pursuant to 18 U.S.C. 2518(1)(c) in its rendition of "other investigative procedures that have been tried and failed." It also presents the corollary question of the degree of discretion that a law enforcement officer has in deviating from the required "full and complete statement" concerning "other investigative procedures" in order to construct a more persuasive and compelling wire-interception application. It is petitioner's contention that each of these two important federal questions has been resolved erroneously by the United States Court of Appeals for the District of Columbia Circuit.

The Decision of the United States Court of Appeals for the District of Columbia Circuit That the Wire Interception Application for 332-3313 and 332-3314 Conformed to the Requirements of 18 U.S.C. 2518(1)(c) Erroneously Resolves an Important Question of Federal Law That Has Not Been and Should Be Decided by This Court.

This case poses a question of recurring frequency in wire-interception litigation and a question that has particularly reared its head as the fund of investigative efforts by ordinary means against wire-interception targets increases. The question is this: To what degree may an applicant for wire interception omit from his application successful prior investigations by ordinary techniques in order to fortify his assertion that such ordinary investigative techniques will be unlikely to succeed. The problem of slanted and incomplete statements of prior investigative activity is a recurring one. This case poses important questions surrounding the ability of a litigant to challenge that kind of governmental conduct.

The wire-interception application submitted on December 31, 1975, for authorization to intercept communications from 332-1313 and 332-1314 failed to set forth fully and completely the requisite information on the use of other investigative techniques, a specific requirement of 18 U.S.C. 2518(1)(c). Judge Corcoran, to whom the application was submitted, was never apprised of the extent and character of prior investigative conduct directed toward the Gianaris brothers through the use of traditional investigative techniques.

In particular, the application of December 31, 1975, misleadingly *omits all reference* to prior use of a pen register, its connection to petitioner Gianaris, its apparent success, and the extent to which it was relied upon by Government officials in the 1972 search of the Gianaris premises. We detail below the significant omissions and misstatements in the application of December 31, 1975, as regards the use of pen registers and other traditional investigative techniques. Whether taken individually or in combination, the omissions and misstatements in the wiretap application in this case render it violative of Section 2518(1)(c) of Title 18.

A. The Function and Importance of Section 2518(1)(c)

Title III of the Omnibus Crime Control and Safe Streets Act of 1968[4] endeavors to satisfy each of the constitutional requirements for wire interception set forth in *Katz* v. *United States,* 389 U.S. 347 (1967) and *Berger* v. *New York,* 388 U.S. 41 (1967). As regards the required showing of exigency, Section 2518 (1)(c) of Title III specifies that as a prerequisite to any wire interception whatever, the application must contain:

> A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.

Section 2518(3(c) imposes the duty upon the reviewing court to determine before issuing any wire-interception authorization that:

[4] P.L. 90-351, 82 Stat. 211-225 (June 19, 1968), 18 U.S.C. 2510 *et seq.*

> Normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.

The American Bar Association "Standards Relating to Electronic Surveillance,"[5] which parallel Title III closely, make clear that these provisions are intended to insure the requisite exigency.

The Senate Committee on Title III speaks forcefully to the need for these kinds of findings. It notes that the required showing of exigency is "patterned after traditional search warrant practice and present English procedure in the issuance of warrants to wiretap by the Home Secretary." Thereafter, the Senate Committee describes the kinds of normal investigative procedures that must be found wanting before wire interception can begin:

> Normal investigative procedures would include, for example, standard visual or aural surveillance techniques by law enforcement officers, general questioning or interrogation under an immunity grant, use of regular search warrants, and the infiltration of conspiratorial groups by undercover agents or informants.[6]

The Department of Justice itself in its Manual for Conduct of Electronic Surveillance under Title III states: "interception under Title III is to be considered an investigative tool of last resort." *See, United States* v. *King,* 335 F. Supp. 523, 541-542 (S.D. Calif. 1971),

[5] ABA Proposed Standards Relating to Electronic Surveillance (1968) at 140-141.

[6] Senate Report No. 1097, April 29, 1968, accompanying Omnibus Crime Control and Safe Streets Act of 1968, at 101.

modified, 478 F.2d 494 (9th Cir.), *cert. denied, sub nom. Light* v. *United States,* 414 U.S. 846 (1973).

The central importance and rigor of application of Section 2518(1)(c) has found wide judicial expression. This Court in reviewing the provisions of Title III affirmed that "wiretapping is not [to be] resorted to in situations where traditionai investigative techniques would suffice to expose the crime." *United States* v. *Kahn,* 415 U.S. 143, 153 n. 12 (1974). *See also, United States* v. *Giordano,* 416 U.S. 505, 515 (1974). Various circuits have been unremitting in their command that a "full and complete" statement describing the insufficiency of "traditional investigative techniques," as mandated by Section 2518(1)(c), is an absolutely essential element of a valid interception application. *See, e.g., United States* v. *Vento,* 533 F.2d 838 (3rd Cir. 1976); *United States* v. *Kalustian,* 529 F.2d 585, 590 (9th Cir. 1975).[7] General declarations of investigative difficulty will not suffice. *United States* v. *Vento, supra* at 849. Nor will conclusory statements or boilerplate recitations, "lest wiretapping become established as a routine investigative recourse of law enforcement authorities, contrary to the restrictive intent of Congress." *Id.* at 849-850. With regard to gambling, it has been said that "law enforcement agencies may not rely upon the general difficulty of apprehending and convicting bookmakers to justify the use of wiretapping." *United States* v. *Feldman,* 525 F.2d 1175, 1178 (9th Cir. 1976). Rather, the affidavit must contain a candid description of specific alternative procedures relating to

[7] *See also, United States* v. *Kerrigan,* 514 F.2d 35, 38 (9th Cir.), *cert. denied, sub nom. Kerrigan* v. *United States,* 423 U.S. 924 (1975); *United States* v. *Curreri,* 388 F. Supp. 607, 608 (D. Md. 1974).

the particular case at hand. While these procedures need not have been exhausted, the application must contain a "full and complete statement" as to why they are unworkable within the framework of the particular investigation. Conclusory assertions, boilerplate, and appeals to "general investigative experience" are not consistent with the section's commands nor are they consistent with the important constitutional purpose it serves.

B. The Omissions and Misrepresentations Regarding Prior Pen-Register Use

At the heart of the December 31, 1975, application for interception of 332-1313 and 332-1314 is the claim that pen-register investigation of suspected telephones would be useless. (December 31, 1975, Application at 6.) The establishment of this proposition allowed the FBI to skip the use of the pen-register technique, an otherwise traditional method of investigating gambling activity prior to the installation of a wiretap, and jump directly to installation of the desired wire interception on the target telephones. In convicing Judge Corcoran, however, that pen-register usage would prove fruitless, the Government either knowingly or negligently made several critical misrepresentations or omissions of highly material fact.

First, on December 14, 1971, the FBI obtained approval from the United States Magistrate in Alexandria, Virginia, to install a pen register on a telephone located at 6200 Wilson Boulevard, Falls Church, Virginia. On that same day, it also obtained authorization to install a pen register on the telephone at 750 S. Dickerson Street, Arlington, Virginia. Targets of both pen registers were members of the Freeman family, the

same persons specified as potential associates of the Gianaris brothers throughout the wiretap application of December 31, 1975. (*See, e.g.*, December 31, 1975, Application at 27, 28.) Both pen registers were requested by an affidavit submitted by agents of the FBI asserting the value of the pen-register technique in sports betting and gambling investigations. One of the pen registers revealed no information. The other—the Wilson Boulevard installation—revealed a wide range of information including patterns of incriminating calls on key betting days and some telephone communications to telephones listed to petitioner Gianaris. The information developed by the pen register at Wilson Boulevard in 1971 was considered by the FBI to be highly significant and reliable. It was relied upon by the FBI in March 1972 in obtaining a search warrant for premises occupied by petitioner at 3201 Wisconsin Avenue, N.W., Apartment 305. (March 8, 1972, Affidavit at 5-6.)

Nothing about the prior successful pen register appears in the 1975 wiretap application, however, although Agent Marsh, the author of the application, was well aware of it.

Second, the 1975 wiretap application affirmatively misrepresents the character of the investigation underlying the 1972 search of the apartment at 3201 Wisconsin Avenue so as to conceal the fact that pen-register results played an important role. The application describes the 1972 investigation and search thusly:

> On March 10, 1972, an investigation of the Gianaris gambling operation culminated with the execution of a search warrant on a Gianaris gambling office. This investigation included the use of three confidential sources, twenty-four physical surveillances and numerous record and file reviews. (December 31, 1975, Application at 5.)

* * *

In fact, the investigation also included the use of the S. Dickerson Street and Wilson Boulevard pen registers and their results, a circumstance implicitly denied by the omission of this fact from the description set forth above.

Third, as a consequence of the omission to specify anything concerning the 1971 pen register, other aspects of the 1975 wiretap application assume a highly misleading cast. Agent Marsh purports, at page 6 of the application, to deprecate a pen-register usage during sports gambling investigations, asserting that no "concrete" time patterns may be established for betting calls and that only subscribers to outgoing numbers called can be ascertained, there being "no assurance that these subscribers are the individuals who are actually involved." Both of these assertions, however, are directly contravened by the concealed 1971 Wilson Boulevard pen register. As we have indicated, the FBI found time patterns of calls developed by the 1971 Wilson Boulevard pen register to be of prime significance:

> The device to register telephone calls reflected upwards of sixty incoming and outgoing calls at this number each day it was operating. December 16, 1971, was a Thursday, and in the experience of agents who investigate gambling matters, it is known that this is generally the last day the updated odds for the weekend sports contests are available. (March 8, 1972, Affidavit at 5.)

The FBI also found of significance the patterns of telephone calls from the pen-registered telephone out to a

telephone number listed to petitioner both on Thursdays and Sundays, the two significant betting days during the football season. And it was able to connect the telephone number (244-4620) called by the pen-registered telephone to petitioner.

The omissions and distortions set forth above fatally infect the 1975 wiretap application and require suppression of its fruits. First, as a general proposition deliberate falsity or reckless disregard of the truth may itself constitute grounds for finding the warrant application inadequate, judging it simply on traditional search-warrant affidavit standards. *Franks* v. *Delaware,* —— U.S. ——, 57 L. Ed.2d 667 (1978).

Second, we are dealing here not with an ordinary search-warrant affidavit. We are dealing with a request for court-authorized wire interception. The Government's pleading techniques must meet standards prescribed both by the Fourth Amendment and by statute. And these pleading practices must be more than simply marginally truthful and nondistortive. The pleading that is the wire-interception application submitted under Section 2518(1)(c) must be a "full and complete statement," the success or lack of success of its more ment is not merely required to set forth a few banalities about prior investigations in order to get its wiretap. It must specify in detail, by "full and complete statement," the success or lack of success of its more traditional investigative efforts. Only by such a "full and complete" statement can the judge to whom the application is taken make the delicate and sensitive judgment as to whether wire interception, the most intrusive investigative technique known, is in fact justified or whether the Government ought to be required

to attempt to achieve its investigative objectives by more traditional and less intrusive means. This is, in one sense, the ultimate balance that the issuing judge must strike.[8] That balance cannot properly be struck if the Government chooses simply to misadvise the issuing judge as to the existence and utility of past pen-register investigations or to pick and choose its past investigations in order best to bolster its requests.

It is not our burden to denominate what Judge Corcoran would in fact have done had he been properly advised. *See, e.g., United States* v. *Bellosi, supra.* It is clear, however, that Judge Corcoran could not properly make determinations on the investigative need for wire interceptions and the lack of utility of pen registers without knowing of the Wilson Boulevard pen register. Had he known of it, he might have requested additional information from the pen register, as was his prerogative under 18 U.S.C. 2518(2). *Cf. United States* v. *Bellosi, supra.* He might have pressed the Government to explain why a series of pen registers on the Freemans, the Gianaris brothers and others would not suffice in lieu of a more intrusive wire interception. He might have questioned representations in the application about the absence of time patterns in sports betting calls. The judge might have raised these or a host of other hard questions regarding investigative need, hard questions that he did not—indeed could not—raise because the Wilson Boulevard pen register and its results were concealed from him.

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[8] *See United States* v. *Bellosi,* 501 F.2d 833, 838-839 (D.C. Cir. 1974), for a full exposition of the kinds of subtle judgments a judge must make in determining whether to grant a wire-interception request.

C. The Omissions and Misrepresentations Regarding Search Warrant Seizures

The December 31, 1975, application for interception of 332-1313 and 332-1314 avers that normal search-warrant execution will not yield significant evidentiary seizures. An informant is averred to have stated that "[petitioner] has made the statement that he did not like to keep more records than necessary." (December 31, 1975, Application at 25.) The location of the tapped telephones is said to be a second-floor apartment that would be difficult to enter on short notice. (December 31, 1975, Application at 4-5.) For these reasons, Agent Marsh concluded that normal search-warrant execution would be unlikely to produce significant evidentiary gains or to produce leads by which a substantial prosecution could be developed.

These representations are neither full and complete nor is their thrust factually correct. First, petitioner was the subject of a successful search at 1522 K Street, N.W., on July 16, 1971, pursuant to United States Warrant No. 4871-71. The wiretap application in this case omits any reference whatever to the 1971 search and seizure, an investigative circumstance that cuts decidedly against the claimed inability to execute successfully search warrants on petitioner's premises.

Second, the FBI in its application does concede that it did successfully execute a search warrant on the premises at 3201 Wisconsin Avenue, N.W., Apartment 305, on March 10, 1972. Judge Corcoran, however, was advised that the seizure from the March 10 search was negligible and failed either to allow the identification of other persons involved in the gambling business or

to support prosecution of the Gianaris brothers for federal, as opposed to local, violations. (December 31, 1975, Application at 5-6.)

That series of representations, which forms an important part of the averring agent's deprecation of the use of normal search and seizure techniques, is highly misleading. The actual seizure from Apartment 305 was anything but negligible. A description of the seizure in the search-warrant inventory occupies two and one-half pages and includes at least forty separate items. It should be apparent that the FBI in the above inventory alleged the seizures of several pages of gambling "work," numerous records, cards, files, telephone numbers and other similar material, and a wide variety of miscellaneous gambling paraphernalia. At least some of the seized materials were transmitted to petitioner by mail or through interstate commerce.

The representation at page 6 of the December 31, 1975, application that the seized material did not identify bettors and others in the gambling operation is inaccurate. The representation that the seized material was not sufficient for successful prosecution under federal statutes is misleading at best.

It is clear that the conclusory averments of the December 31, 1975, application regarding the difficulty of search-warrant execution are not fully consistent with the prior experience of law enforcement authorities, well-known to the FBI. For reasons best known to it, however, the FBI in its application to Judge Corcoran chose to omit any "full and complete" statement about these prior search-warrant experiences. It omitted *all* reference to the K Street search in 1971 and it omitted a "full and complete" reference to the seizure from

Wisconsin Avenue in March 1972 and misleadingly deprecated the seizure in a highly inaccurate way. The effect of these omissions and misstatements is clear. Judge Corcoran was induced to the erroneous belief that indeed search-warrant execution was not likely to produce any substantial information supportive of a federal prosecution of the Gianaris brothers and other alleged associates. As with the omission of the 1971 pen register, the application simply created an inaccurately slanted picture of the need for wire interception and the futility of normal investigative techniques.

It is our prayer that the Court of Appeals, by its judgment of November 21, 1978, affirming petitioner's conviction, wrongly countenanced the statutory and constitutional violations that we have described above and in so doing wrongly decided an important and recurring question of federal law.

CONCLUSION

Wherefore, petitioner respectfully asks that the writ of certiorari issue.

Respectfully submitted,

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December 20, 1978

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1977

No. 78-1125

Criminal 76-782

UNITED STATES OF AMERICA

v.

PETER J. GIANARIS, *Appellant*

Appeal from the United States District Court for the District of Columbia.

Before: WRIGHT, Chief Judge, MCGOWAN and WILKEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c).

On consideration of the foregoing, It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed.

The duty of counsel is fully discharged without filing a suggestion for rehearing *en banc* unless the case meets the rigid standards of Federal Rule of Appellate Procedure 35(a).

Per Curiam
For the Court

/s/ GEORGE A. FISHER
George A. Fisher
Clerk